

Cheah (Migration) [2023] AATA 3866 (14 July 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Poh Tin Cheah
CASE NUMBER:	1930380
HOME AFFAIRS REFERENCE(S):	BCC2017/2374610
MEMBER:	David Crawshay
DATE:	14 July 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211 of Schedule 2 to the Regulations; and • cl.820.221 of Schedule 2 to the Regulations; and • r.2.03A

Statement made on 14 July 2023 at 9:42am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine de facto relationship – financial aspects – nature of the household – social aspects – nature of the commitment – additional criteria for de facto relationship – relationship registered – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65

Migration Regulations 1994 (Cth), rr 1.09A, 2.03A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The applicant applied for the visa on 4 July 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied that she was the de facto partner of the sponsoring partner at the time of application.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant was the de facto partner of the sponsor at the time of application and whether she continues to be his de facto partner at the time of this decision.

Whether the parties are in a spouse or de facto relationship

7. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Background

8. The applicant was sponsored for the present visa by Mr David Andrew Thorburn. She was previously married in 2004 but divorced in 2011. There were no children from this relationship.
9. The sponsor was married in 1997 but divorced her in 2002. There were two children from this relationship – a daughter who was born in 1997 and a son in 1998.
10. The parties claim that they first met in Singapore in June 2013 when they shared a taxi to Sentosa in Singapore while they were both on business there. The applicant visited the sponsor in Australia in August 2013 and they both committed to a shared life together in October 2015.
11. The parties registered their relationship on 4 May 2018.

Are the parties in a de facto relationship?

12. “De facto partner” is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
13. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties’ household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.
14. The parties have provided a number of documents since the delegate’s decision, including:
 - statements from the parties’ joint and personal bank accounts for the period from December 2017 to March 2023;
 - letters from the parties’ superannuation providers showing death nominations made by them;
 - the parties’ Department movement records;
 - correspondence addressed to one or both of the parties at addresses in Doncaster East and Warranwood;
 - numerous photographs of the parties by themselves and with friends and family members for the period from June 2013 to July 2023;
 - travel documents such as flight itineraries, boarding passes, hotel booking receipts;
 - Form 888 and other statutory declarations from friends and family members;
 - a Relationship Certificate dated 4 May 2018; and
 - statutory declarations from the parties detailing their relationship.
15. The Tribunal considers this information to be directly relevant to the four matters under r.1.09A and ultimately to the criteria under the definition of “de facto relationship” in s.5CB(2).

Financial aspects of the relationship

16. The parties have made a number of claims in relation to the financial aspects of their relationship. They claim that the sponsor supported the applicant financially before the she found a job in May 2018. They claim that the applicant has been working alongside the sponsor since March 2019 in his locksmith business looking after the business’s administration, accounts and human resources.
17. The parties claim to have bought a home at an address in Warranwood at auction. They claim to have made their first deposit of \$30,000 from their joint account on 7 October 2017. The parties made further claims in detail about their financial affairs, including when they stopped using certain accounts for expenses, when they opened further accounts and who

paid for what expenses. These claims are largely substantiated by the information on hand, including statements from their joint and personal bank accounts for the period from December 2017 to March 2023 which complement earlier account statements given at the visa application stage.

18. Based on this and other pieces of information, the Tribunal accepts that the sponsor has purchased a house at the Warranwood address and that at least some of the loan repayments for this house have been paid for by the applicant, either through the deposit or through the ongoing loan repayments which are drawn from one of the parties' joint accounts. This aspect is given substantial weight.
19. Moreover, given the detailed nature of the parties' claims in relation to their financial affairs which have been substantiated by documentary evidence, the Tribunal accepts that the parties have pooled their financial resources and that they share day-to-day household expenses. These aspects are again given substantial weight.
20. The parties submitted documents showing that the parties are beneficiaries of each other's superannuation policy along with his two children and that the sponsor is beneficiary of the applicant's superannuation policy.
21. The Tribunal finds that the financial aspects of the parties' relationship points to them being in a genuine and continuing relationship at the time of application and at the time of this decision.

Nature of the household

22. The parties have no children of their relationship, although the sponsor has two adult children. While the applicant claims to pick up and drop off Callum from time-to-time, no other specific claims were made to substantiate that the parties have joint responsibility for the care and support of the sponsor's two children. Little weight is accorded to this aspect.
23. The parties claim that they initially lived with the sponsor's parents at an address in Doncaster East after the applicant arrived in Australia in June 2016 until November 2017 when they moved to the address in Warranwood. They claim to have lived together with the sponsor's son. They claim that the sponsor's daughter moved in with them in December 2021. The parties claim to have a pet dog named Peggy. They claim to share household chores in a flexible manner as the applicant works from home and the sponsor is running his business in Box Hill.
24. The parties submitted further correspondence addressed to one or both of them at the Doncaster East and Warranwood addresses, including utility bills, bank statements, letters from insurance providers and rates notices from Maroondah City Council. This supplements the correspondence already submitted. While the Tribunal notes that this correspondence may be generated with little or no processes to verify the living arrangements of the parties, it accepts based on other evidence such as evidence that both parties have contributed to loan repayments on the Warranwood address that the parties have been living together from when the applicant arrived in Australia permanently in June 2016. This aspect is given substantial weight.
25. The Tribunal has considered that the nature of the household indicates that the parties have been living together and have been in a genuine and continuing relationship at the time of application and at the time of this decision.

Social aspects of the relationship

26. The Tribunal has considered photographs of the parties that span the period from June 2013 to July 2023. It must be said that this collection of photographs is prolific and depicts the parties by themselves and with multiple third parties from various friendship groups and their family members – especially the sponsor’s parents and his two children. Many are taken in social situations and on the numerous holidays they have taken. The applicant is involved in and contributes to a WhatsApp group along with members of the sponsor’s family.
27. The Tribunal has also considered Form 888 declarations from family members such as the sponsor’s mother and father and from friends who had known the sponsor for periods of up to 38 years at the time of making the declarations. It accepts that these people are in a position to be able to comment on the genuineness of the parties’ relationship.
28. This information is given significant weight by the Tribunal in finding that the parties have represented themselves to others as being in a de facto relationship with each other and are recognised by these people as such.
29. The parties claim that they have travelled together overseas and interstate and attended major events, festival celebration and many other social events with family and friends. These events include staying at a friend’s farm in Ceduna for Christmas in December 2017, celebrating 2018 Christmas in Dromana with the sponsor’s family in their family’s beach house, spending 2019 Christmas with the sponsor’s uncle in Trentham; attending the wedding of the applicant’s sister in Malaysia in June 2017 and attending the graduation ceremony for the sponsor’s daughter in December 2019. Other documentary evidence such as itineraries, boarding passes, hotel booking receipts and movement records substantiate the many holidays taken by the parties. The Tribunal accepts that the parties plan and undertake a high number of joint social activities. This aspect is given substantial weight.
30. The Tribunal finds that the social aspects of the parties’ relationship points firmly in favour of them being in a genuine and continuing relationship.

Nature of the parties’ commitment to each other

31. The Tribunal has considered the parties’ claims about the inception and development of their relationship from when they first claim to have met in June 2013. Helpfully, almost every event in their relationship is accompanied by documentary evidence such as photographs. This is significant. Department movement records shows that they travelled to stay with each other every three-or-four months between June 2013 and June 2016 when the applicant agreed to settle in Australia. The Tribunal accepts this information and accepts that the parties met in the manner claimed and that their relationship developed along the lines claimed by them. As above, it accepts that they began living together in June 2016 when the applicant arrived in Australia to live permanently. These aspects are given significant weight.
32. The Tribunal finds that the preponderance of cogent and compelling information is indicative to the parties’ relationship being a committed one since when they first met in June 2013, or over 10 years ago. The parties appear to be at ease in each other’s presence and do not hide their affection for each other. The Tribunal is left in no doubt that they draw companionship and emotional support from each other and that they see their relationship as a long-term one. These aspects are given substantial weight.
33. Having considered the information in front of it, the Tribunal finds that the nature of the parties’ relationship gives strong support to them being in a genuine and continuing relationship and having a mutual commitment to a shared life to the exclusion of all others at all material times.

Are the parties related to each other?

34. There is no evidence to show that the parties are related to each other. The Tribunal accepts that the applicant meets s.5CB(2)(d).
35. On the basis of the above evidence and findings, the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made. The parties have had a mutual commitment to a shared life to the exclusion of all others, their relationship has been genuine and continuing, they have been living together and they are not related to each other at the time of application. Because the applicant was in a de facto relationship with the sponsor at the time of application, the applicant was his de facto partner pursuant to s.5CB(1) at that time. Therefore, the applicant meets cl.820.211(2)(a).
36. The Tribunal is satisfied that the applicant was sponsored by the sponsor at the time of application pursuant to cl.820.211(2)(c)(i). Lastly, the Tribunal accepts that the visa application was made within 28 days after the applicant's previous substantive visa ceased and she is not subject to the Schedule 3 criteria under cl.820.211(2)(d)(ii). Therefore, the applicant meets cl.820.211(2).
37. Because the applicant was not the holder of a Subclass 771 (Transit) visa at the time of application, she meets cl.820.211.
38. The applicant continues to meet the requirements of cl.820.211(2) at the time of decision. She therefore meets cl.820.221(1)(a).
39. Based on the information in front of it, including a National Police Check from the Australian Federal Police dated 17 March 2023 in respect of the sponsor showing no disclosable court outcomes, the Tribunal finds that there are no sponsorship limitations applicable to the sponsor under Division 1.4B of the Regulations. Clause 820.221(4)(a) is met and because the sponsor has consented to the disclosure of any relevant conviction, cl.820.221(4)(b) is met. Clause 820.221(4) is met in its entirety and therefore cl.820.221 is met.

Are the additional criteria for a de facto relationship met?

40. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
41. The applicant must have been in the de facto relationship for at least the 12-month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
42. The applicant has provided a Relationship Certificate dated 4 May 2018 in respect of the parties. The Tribunal accepts that this is evidence that the relationship is registered under the *Relationships Act 2008* (Vic) as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12-month requirement does not apply.
43. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

44. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

45. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A.

David Crawshay
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).